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Supreme Court, U.S.
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In The

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Supreme Court of the United States

October Term 1997

DENISE BEVARD,

Petitioner,

v.

FARMERS INSURANCE EXCHANGE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR WRIT OF CERTIORARI

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34 pp

QUESTION PRESENTED

Denise Bevard, the petitioner, sued her insurance carrier in a diversity action after the carrier denied her uninsured motorist claim. She rejected an offer of judgment of $8,001--for damages, costs and (she believed) attorney's fees--from the insurer made pursuant to Fed. R. Civ. P. 68. Then she obtained a judgment of $5,625 in trial. The pre-offer costs that could have been allowed raised that amount to $7,541. Attorney's fees were not allowed her either as costs or attorney's fees. As a result, certain costs were awarded against her based on a finding that the insurer was the prevailing party for the purposes of Fed. R. Civ. P. 68.

The lower courts held that reasonable attorney's fees could not be counted in deciding which party prevailed under Fed. R. Civ. P. 68. The question presented here is:

When ascertaining which party has prevailed for the purpose of awarding costs and attorney's fees pursuant to Fed. R. Civ. P. 68, is it permissible to weigh an award of damages alone against an offer of judgment that includes damages, costs and attorney's fees?

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PETITION FOR WRIT OF CERTIORARI

Denise Bevard ("Bevard"), an individual, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 28, 1997, in order to resolve the conflict between the United States Supreme Court, the Seventh Circuit and the Fourth Circuit Court, on one hand, and the Ninth Circuit Court and Nevada courts, on the other, on the important issue presented herein.

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The per curiam opinion of the United States Court of Appeals for the Ninth Circuit that gives rise to this petition is published by order of the Ninth Circuit. That opinion, *Bevard v. Farmers Insurance Exchange*, _____ F.3d _____ (1997, 9th Cir.), is reprinted in Appendix A hereto ("App. A") at page A-1. By order filed December 12, 1997, the Ninth Circuit denied the petition for rehearing and suggestion for rehearing en banc. App. B.

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JURISDICTION

On August 16, 1995, the United States District Court, District of Nevada, entered an order denying a post-trial motion by Bevard for attorney's fees and granted a motion by Farmers Insurance Exchange for costs, that order, as amended, having been entered on November 27, 1995, for $8,419.32. App. C. Bevard filed her motion for reconsideration on August 24, 1995, and decision entered on October 3, 1995. On May 30, 1995, Bevard had filed a timely notice of

appeal to the United States Court of Appeals for the Ninth Circuit, and she filed an amended notice of appeal on November 13, 1995.

The Ninth Circuit, in a per curiam opinion filed on October 20, 1997, and designated for publication, affirmed the rulings of the District Court on the motions for costs and attorney's fees. On December 12, 1997, the Ninth Circuit denied Bevard's timely-filed petition for rehearing with suggestion for rehearing en banc on December 12, 1997. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of the rehearing.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

Federal Rule of Civil Procedure 68 ("Fed. R. Civ. P. 68") provides:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof

> and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

Nevada Rule of Civil Procedure 68 ("Nev. R. Civ. P. 68"), as amended in 1988, provides:

> At any time more than 10 days before the trial begins, any party may serve upon the adverse party an offer to allow judgment to be entered for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance

> together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree shall not recover costs, nor attorneys' fees, but shall pay the costs and attorneys' fees, if any be allowed, of the party making the offer from the time of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

Nevada Revised Statute 17.115 ("NRS 17.115"), as amended in 1987, provides:.

> 1. At any time more than 10 days before trial, either informally or at any pretrial conference presided over by a judge of the court in which the action is pending, any party may serve an offer in writing to allow judgment to be taken in accordance with the terms and conditions stated at that time.

2. If the offer is accepted, the judge of the court in which the action is pending shall enter judgment accordingly.

3. If the offer is not accepted before trial or within 10 days after it is made, whichever occurs first, it shall be deemed withdrawn, and cannot be given in evidence upon the trial.

4. If the party to whom the offer of judgment is made fails to obtain a more favorable judgment, he cannot recover:

(a) Interest on the judgment for the period between the time of service of the summons and complaint and the time of entry of the judgment; or

(b) Costs or attorney's fees, and the court shall order him to pay to the party who made the offer that party's taxable costs incurred from the date of filing the complaint, and may order also a reasonable sum to cover costs of the services of expert witnesses who are not regular employees of any party actually incurred and reasonably necessary in the preparation of the case for trial by the prevailing party, interest on the judgment from the time of the offer to the time of entry of the judgment and reasonable attorney's fees incurred by the party making the offer from the time of the offer.

5. Any taxable costs, attorney's fees and interest which is not derived from an interest-bearing obligation which may have been awarded must not be considered to be part of the judgment when determining

whether the judgment was more favorable than the rejected offer.

6. If the attorney of the party for whom the offer of judgment is made is collecting a contingent fee for his services, the amount of any attorney's fees awarded to the party for whom the offer is made must be deducted from that contingent fee.

7. Any judgment entered pursuant to this section shall be deemed a compromise settlement.

Nevada Revised Statute 18.010 ("NRS 18.010"), as amended in 1985, provides:

1. The compensation of an attorney and counselor for his services is governed by agreement, express or implied, which is not restrained by law.

2. In addition to the cases where an allowance is authorized by specific statute, the court may make an allowance of attorney's fees to a prevailing party:

(a) When he has not recovered more than $20,000; or

(b) Without regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought without reasonable ground or to harass the prevailing party.

3. In awarding attorney's fees the court may pronounce its decision on the fees at the conclusion of the trial or special

> proceeding without written motion and with or without presentation of additional evidence.
>
> 4. No oral application or written motion for attorney's fees alters the effect of a final judgment entered in the action or the time permitted for an appeal therefrom.
>
> 5. Subsections 2, 3 and 4 do not apply to any action arising out of a written instrument or agreement which entitles the prevailing party to an award of reasonable attorney's fees.

Finally, the U.S. District Court for the District Court of Nevada has a local rule which contains a provision which is parallel to one in NRS 17.115. Local Rule 205-12 reads:

> If the defendant offers a judgment in a certain sum with costs then accrued which is not accepted by the plaintiff, and the case thereafter goes to trial with the resulting judgment of only the amount previously offered by the defendant, or less, then the defendant is the prevailing party. Costs and attorney's fees shall not be included in calculating which party is the prevailing party.

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STATEMENT OF THE CASE

This diversity case arose out of an automobile accident claim by Bevard. She was hurt in a collision involving an uninsured motorist on August 19, 1992. Her own insurer, Farmers Insurance Exchange, denied payment of uninsured

motorist benefits based on a question of liability. Bevard sued Farmers on December 15, 1993, and on July 25, 1994, Farmers made an offer of judgment in the amount of Eight Thousand and One Dollars ($8,001.00), that offer to include any recoverable costs. To that time, Bevard had incurred attorneys' fees of Nine Thousand Three Hundred Sixty Dollars ($9,360.00) and costs of One Thousand Nine Hundred Sixteen Dollars and Ninety Cents ($1,916.90). She rejected the offer of judgment.

On April 24, 1995, the case went to jury trial in the U.S. District Court of Nevada, the Hon. Howard D. McKibben presiding. The jury returned a verdict in Bevard's favor in the amount of Seven Thousand Five Hundred Dollars ($7,500.00)--reduced by her comparative negligence of twenty-five percent (25%) for a net award of Five Thousand Six Hundred Twenty Five Dollars ($5,625.00). Asserting she was the prevailing party, Bevard moved for costs and attorney's fees totaling Thirty-Four Thousand One Hundred Sixty Dollars ($34,160.00).

Farmers countered that under Fed. R. Civ. P. 68, it was entitled to post-offer costs and attorneys' fees of Twenty-Two Thousand Six Hundred Twenty Seven Dollars ($22,627.00).

On August 16, 1995, the District Court entered an order that provided:

> 1. That Bevard be allowed costs incurred prior to July 25, 1994, together with appropriately taxable fees other than attorney's fees. The costs added to the amount of the verdict would have amounted to $7,541--less than the offer of $8,001 by $460.

2. That Farmers be allowed all taxable cos[illegible]nd fees from and after July 24, 1994.

3. That neither side was awarded attorney's fees from the other.

4. And that each side had to bear its own attorney's fees.

Contentions on Appeal

On appeal, Bevard contended she was entitled to attorney's fees pursuant to Nevada Revised Statute 18.010 and that she should not be held liable to Farmers for post-offer costs. She cast herself as the prevailing party since (1) an award of attorney's fees to her was proper under NRS 18.010 and (2) since her pre-offer attorney's fees alone were greater than the amount of the offer.

The Ninth Circuit affirmed the District Court, holding that Nevada law determined Bevard's entitlement to attorney's fees since the matter was a diversity case. To a point, this was appropriate since federal courts are required to apply the state law in diversity actions with regard to the allowance or disallowance of attorney's fees. Moreover, it is well established that when state statutes allow the prevailing party attorney's fees, such fees may be recovered in Federal Court. See *Schulz vs. Lamb*, 591 F.2d 1268 (9th Cir. 1978). Nevertheless, the Ninth Circuit declined to find Bevard was entitled to an award attorney's fees pursuant to NRS 18.010.

In applying Nevada law in its holding, the Ninth Circuit based its opinion on a Nevada Supreme Court ruling that courts could not award attorney's fees under NRS 18.010 when they were precluded from awarding them under Nev. R. Civ. P. 68. In the words of the circuit court opinion:

The district court determined that Bevard did not improve her position by rejecting Farmers' offer and going to trial and, therefore, that she was liable for Farmers' post-offer costs. *See Fed. R. Civ. P.* 68. Bevard only improved her position by going to trial if Farmers' offer included attorney's fees. It did not.

In *Nusom v. Comh Woodburn, Inc.*, 122 F.3d 830 (9th Cir. 1997), we held that "a rule 68 offer for judgment in a specific sum together with costs, which is silent as to attorney fees, does not preclude the plaintiff from seeking fees when the underlying statute does not make attorney fees a part of the costs." *Id.* at 835. We also stated that in a Rule 68 Offer of Judgment, "any waiver or limitation must be clear and unambiguous" with respect to attorney's fees. *Id.* at 833.

In this case, Farmers' offer totaled $8.001, "including any recoverable costs and fees." The offer on its face includes costs, but it does not explicitly exclude seeking attorney's fees. Defendant here did not make explicit that its offer did not permit plaintiff to recover attorney's fees as required under *Nusom*. *Id.* at 834 (noting that "defendants bear the brunt of uncertainty but easily may avoid it by making explicit that their offers do or do not permit plaintiffs to recover attorney fees"). We therefore conclude that the offer did not include attorney's fees.[1]

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[1] In a partial dissent, Circuit Judge Norris disagreed with the finding the offer did not include attorney's fees.

Bevard's petition for rehearing and suggestion for rehearing en banc were denied.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's Opinion Directly Conflicts With The United States Supreme Court's Ruling in *Marek*, The Seventh Circuit Court's Ruling in *Grosvenor*, And The Fourth Circuit Court's Ruling in *Marryshow*, And It Is Contrary To Logic, Fairness and The Equal Access To Courts Guaranteed in American Jurisprudence And By The U.S. Constitution.

The Ninth Circuit's opinion directly conflicts with the United States Supreme Court's ruling in *Marek v. Chesny*, 473 U.S. 1, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985). In *Marek* a civil rights plaintiff sued for damages for an alleged violation of rights under 42 U.S.C. § 1983 and for attorney's fees under 42 U.S.C. § 1988. The defendant made a $100,000 all-inclusive lump sum offer of judgment under Fed. R. Civ. P. 68. The plaintiff rejected the offer, then obtained only $60,000 at trial. Without dispute, the value of the plaintiff's attorney's fees prior to the offer of judgment was fixed at $32,000. That meant a judgment of $92,000--short of the offer of judgment by $8,000. However, the plaintiff then made a post-trial motion for attorney's fees for services performed after the making of the offer of judgment, but the motion failed. The plaintiff appealed.

The principal *Marek* question was "whether attorney's fees incurred by a plaintiff subsequent to an offer of settlement under Federal Rule of Civil Procedure 68 must be paid

by the defendant under 42 U.S.C. § 1988, when the plaintiff recovers a judgment less then the offer." *Id.* at 473 U.S. 3. The answer was a straightforward *no*. A secondary question was whether the word "costs" as used in Fed. R. Civ. P. 68 included attorney's fees. The answer, in the words of the opinion, was: "Thus, absent congressional expressions to the contrary, where the underlying statute defines costs to include attorney's fees, we are satisfied such fees are to be included as costs for the purposes of Rule 68." *Id.* at 473 U.S. 9.

There is one apparent but not actual difference between *Marek* and the case at bar. *Marek* was filed under a statutory scheme that provided for attorney's fees to a prevailing plaintiff. There is no parallel provision for personal injury plaintiffs or breach of contract plaintiffs.[2] However, in NRS 18.010, Nevada does have a statutory provision that should have been applied, namely, NRS 18.010, and for reasons discussed below the amount of the NRS 18.010 award should have been added into the judgment for ascertaining whether Bevard or Farmers was the prevailing party for purposes of the fee-shifting Rule 68 and NRS 17.115.

The Ninth Circuit's opinion also contravenes that of the Seventh Circuit in *Grosvenor v. Brienen*, 801 F.2d 944, 948 (7th Cir. 1986), reading in part:

> [W]e hold that pre-offer attorney's fees must be added to the judgment award for the purposes of determining whether the result obtained by a plaintiff is more favorable than the offer of judgment he rejected.

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[2] Contractual provisions for such fees notwithstanding.

> The conclusion we reach is supported by the Supreme Court's analysis of Rule 68 in *Marek*. Rule 68 refers to the 'judgment' obtained by the plaintiff. There is no reason to understand the term 'judgment' to refer only to the jury's verdict on damages, rather than to both the verdict and the district court's determination of reasonable pre-offer fees under subsection 1988 . . . .
>
> At the time the offer is made the plaintiff knows the amount in damages caused by the challenged conduct. The plaintiff also knows, or can ascertain, the costs then accrued. A reasonable determination whether to accept the offer can be made by simply adding these two figures and comparing the sum to the amount offered. *Marek v. Chesny*, 473 U.S. 1 (1984).
>
> *Grosvenor v. Brienen*, at 801 F.2d 948

A more illuminating recent explanation of the principle at issue comes from the Fourth Circuit in *Marryshow v. Flynn*, 986 F.2d 689 (4th Cir. 1993). In that matter, a civil rights plaintiff obtained a jury verdict and an award of fees, which was appealed. The Fourth Circuit court re-examined Federal Rule 68 and held that:

> Rule 68 requires that a comparison be made between an offer of judgment that includes "costs then accrued" and the "judgment finally obtained." It is neither logical nor consistent with the rule and applicable authority to compare an offer of judgment

which includes all costs, including attorney's fees, and a judgment finally obtained which includes no costs. To make a proper comparison between the offer of judgment and the judgment obtained when determining, for Rule 68 purposes, which is the more favorable, like "judgments" must be evaluated. Because the offer includes costs then accrued, to determine whether the judgment obtained is "more favorable," as the rule requires, the judgment must be defined on the same basis--verdict plus costs incurred as of the time of the offer of judgment. The post-offer costs--the very cost at issue by virtue of the rule's application--should not, however, also be included in the comparison and thereby become the vehicle to defeat the rule's purpose.

. . . .

We therefore hold that when evaluating, for Rule 68 purposes, the "judgment finally obtained" to determine whether it is more favorable to a plaintiff than an earlier offer of judgment by the defendants, the judgment finally obtained must include not only the verdict of the jury but also the costs actually awarded by the court for the period that preceded the offer.

Marryshow v. Flynn, 986 F.2d 689 (4th Cir. 1993)

Contravening State Law

The genesis of the error complained of, by both the district court and the court of appeal, inheres in a Nevada Revised Statute 17.115 and in the district court's Local Rule 205-12. The statute and the local rule contravene the principal of the three cases cited.

First, NRS 17.115, in the part pertinent here, provides that:

> 4. If the party to whom the offer of judgment is made fails to obtain a more favorable judgment, he cannot recover: (¶) (a) Interest . . . . (¶) (b) Costs or attorney's fees, and the court shall order him to pay to the party who made the offer that party's taxable costs incurred from the date of filing the complaint, and may order also . . . interest . . . and reasonable attorney's fees incurred by the party making the offer from the time of the offer. (¶) 5. *Any taxable costs, (or) attorney's fees . . . which may have been awarded must not be considered to be part of the judgment* when determining whether the judgment was more favorable than the rejected offer. (Emphasis added.)

The District Court's Local Rule tracks the state statute, as follows:

> If the defendant offers a judgment . . . and the case thereafter goes to trial with the resulting judgment of only the amount previously offered by the defendant, or less, then the defendant is the prevailing party. *Costs*

> *and attorney's fees shall not be included in calculating which party is the prevailing party.* (Emphasis added.)

Read facially, the statute and the rule, as well as cases upholding them, require the balancing of the naked amount of a judgment against offers which are for damages, costs and attorney fees. Such a weighing contravenes *Marek*, *Grosvenor* and *Marryshow*.

The Ninth Circuit Court accepted the facial reading and approved it. The court chose to rely on *Bowyer v. Taack*, 107 Nev. 625, 817 P.2d 1176 (1991). In that matter, the Nevada Supreme Court considered claims parallel to those in the matter at bar and concluded: "[T]hat where litigants are precluded from obtaining attorney's fees under NRS 17.115 or Nev. R. Civ. P. 68, they are likewise precluded from recovering such fees under NRS 18.010." *Id.* at 107 Nev. 627. Moreover, "The provisions of NRS 17.115(5) outline what can be included in a judgment when deciding whether the judgment is more favorable than an offer of judgment." *Id.* at 107 Nev. 628. The Nevada opinion also contained these words at the end of the court's analysis, an analysis in which the Nevada justices declined to follow federal interpretations of Fed. R. Civ. P. 68: "We hold that under either Nev. R. Civ. P. 68 or NRS 17.115, taxable costs, attorney's fees, and prejudgment interest should not be included as part of a judgment to determine whether the judgment is greater than a previously tendered offer of judgment." At 107 Nev. 629.

***Bowyer* Failings**

The law in Nevada, whether in state or federal court, is uniform, and in Bevard's opinion, uniformly at variance

with American concepts of fundamental fairness and equal justice.

The question raised in this petition, then, is--even with the support of the statute and the local rule--when ascertaining which party has prevailed for the purpose of awarding costs and attorney's fees pursuant to Fed. R. Civ. P. 68, can it be permissible to weigh an award of damages only against an offer of judgment that includes damages, costs and attorney's fees? In Bevard's view, the answer has to be no.

For proper and fair application of Rule 68, Bevard suggests two alternative approaches:

> -- Back allowable costs and fees out from the face amount of a Rule 68 offer and use the figure remaining as the true benchmark for measuring the verdict.
>
> -- Or add allowable costs and fees to the verdict and balance that sum against such an offer.

The second alternative gained recognition in *Marek*, *supra*. In that matter, the Supreme Court added the plaintiff's pre-offer attorney's fees to the amount of the award for damages. Bevard views that is the prescribed approach, based on the *Marek* opinion. For Chesny, the *Marek* plaintiff, adding the attorney's fees to the judgment still left him short; for Bevard it would not have. The principal, then, should have been applied--to her advantage.

It was not, and Bevard asserts that It was improper to weigh her naked dollar verdict against the pre-trial settlement offer that was phrased to include damages, costs and fees. As quoted above, Fed R. Civ. Pro. 68 speaks of an offer

"with costs then accrued." The preposition "with" has many meanings, but the one that weighs most heavily for interpreting this provision is "accompanied by." (*The Random House College Dictionary*, Rev. Ed., 1982.) The section on its face, then, calls for an offer to be made in a certain sum for damages (or compromise thereof) *plus costs*. However, a single, stand-alone lump sum offer with nothing to be added is permitted by *Marek* and by *Fleisher v. August*, 103 Nev. 242, 737 P.2d 518 (1987). Bevard concurs that there is nothing invalid about such an offer, especially if it is accepted as drafted. However, for the reasons dealt with herein, she contends that such an all-inclusive offer cannot properly be weighed against a bench award or jury verdict for damages alone in the same way as an offer phrased in the language of Rule 68, that is, for a sum certain "with costs then accrued."

It is illogical and unfair to measure an all-inclusive offer of judgment against an award of damages only. The offer includes costs and attorney fees, along with damages; the verdict does not--as an award of damages only. Such weighing does no more than promote injustice. Whether sanctioned by statute or by statute blessed by court interpretation or not, it is a deprivation of a true day in court for a plaintiff offeree. The reason: that offeree is told he must obtain a verdict for damages only that is more favorable to him than a combined offer of damages, costs and attorney's fees.

This edict, of course, is considerably more burdensome for a plaintiff than for a defendant. Worse, by its application, it operates to give a defendant an undue and unfair edge. The defendant needs a low award, and a verdict is for damages only--a lower figure than a combined award for damages, interest, costs and fees. To elaborate on the imbalance, a defendant need be concerned only with a figure for damages in evaluating an offer of judgment, whether as

offeror or offeree.[3] The plaintiff has to weigh his law-granted entitlement to damages, interest, costs and fees against an all- inclusive lump sum offer--which in all probability is based on jury verdict statistics--in deciding whether to risk the penalties imposed by either the federal or state Rule 68 plus, as to the latter, NRS. 17.115. That means the plaintiff's opportunity to recover fully is shaved improperly and unconscionably.

Under the U.S. Constitution--Article IV as well as the First and Fourteenth Amendments--this shaving deprives the plaintiff of equal protection under the law, and it deprives him of due process. Unless he gives up his right to costs and fees in evaluating an offer of judgment, the plaintiff is not accorded the same opportunity to prevail--or to avoid not prevailing--in court as the defendant. This amounts to a *de facto* denial of his access to the courts and a denial of his opportunity to be heard on an equal footing with the defendant. Moreover, because of the handicap imposed by the rule and the statute, the plaintiff is more likely than the defendant to incur the penalties imposed by the rule and the statute--and therefore to lose the object of litigation, that is, in most cases, cash recovery for damages. His day in court has been turned to a sham.

There is a difference--but one which becomes a parallel--in the application of Fed. R. Civ. P. 68 in a civil rights case and the application of either Fed. R. Civ. P. 68 or Nev. R. Civ. P. 68 in a tort case governed by state law. In civil rights litigation, 42 U.S.C. 1983 provides the right to seek redress for a violation of one's civil rights, while 42 U.S.C. § 1988 adds the right to petition for attorney's fees

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[3] Nevada's Rule 68 permits offers by both plaintiffs and defendants.

after it is established that a plaintiff's rights were in fact violated. Nevada does not have a completely parallel statute which provides for attorney's fees as an inducement to attorneys to litigate civil rights matters. However, Nevada does have a statute that provides for an award of attorney's fees to a prevailing party in a low-dollar case, namely, NRS 18.010, *supra*. That statute provides the parallel. It supports an award of attorney's fees to the Bevard in this case, and that award should have been added to the amount of the judgment in the application of Fed. R. Civ. P. 68. So, also, should her pre-offer attorney's fees have been added.

These contentions are supported by *Nusom*, *supra*. That case permitted looking to an underlying statute (which would be NRS 18.010 for Bevard) when the Fed. R. Civ. P. 68 offer of judgment in a specific sum together with costs was silent as to attorney fees. Further, that case held that a plaintiff would not be precluded from seeking attorney's fees when the underlying statute did not make such fees a part of the costs. Under *Nusom*, Bevard should be awarded attorney fees either way--as part of the costs with NRS 18.010 as the underlying fee statute, or as fees since attorney's fees were not explicitly made a part of costs.

"More Favorable Judgment"

Neither Rule 68 nor NRS 17.115 defines "more favorable judgment" except by the exclusions of Paragraph 5 of the latter--the prohibition against adding costs and attorney's fees to the face amount of the judgment to arrive at a final judgment figure to ascertain "more favorable." This, as noted above, contravenes *Marek v. Chesny*, as well as due process and access to the courts provisions.

In Bevard's view, fairness, equality under the law, and equal access to the courts can only be achieved by measuring aggregate against aggregate. That means when considering fee-shifting statutes and rules, courts must balance the amount of a judgment plus the amount of allowable costs plus the amount of allowable attorney's fees against offers of judgment that are drafted to include damages plus allowable costs plus allowable fees.[4]

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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[4] There may be variations involving damages plus costs including fees, costs not including fees, costs only, and fees only. However, the principal remains the same: only like packages should be weighed against one another.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-16047
D.C. No. CV-93-00827-HDM
* * * * * * * * * * * * * * * * * * *

DENISE BEVARD,
Plaintiff-Appellant,

v.

FARMERS INSURANCE EXCHANGE,
Defendant-Appellee.

* * * * * * * * * * * * * * * * * * *

OPINION

Appeal from the United States District Court
for the District of Nevada
Howard D. McKibben, District Judge, Presiding

Argued and Submitted November 8, 1996
San Francisco, California

Before: NORRIS and KOZINSKI, Circuit Judges, and MOLLOY,* District Judge.

PER CURIAM:

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* The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

Denise Bevard made a claim against her insurer, Farmers Insurance Exchange, but Farmers denied coverage. After Bevard filed suit in federal court, Farmers made an $8,001 offer of judgment pursuant to Fed. R. Civ. P. 68. The offer included "recoverable costs and fees." Bevard turned down the offer and proceeded to trial, where she was awarded $5,625. After trial both parties sought costs and attorney's fees. The district court ordered Bevard to pay Farmers' post-offer costs and let each party bear its own attorney's fees. Bevard appeals the district court's determinations that she was not entitled to attorney's fees under Nevada Revised Statute 18.010 and that she was liable to Farmers for post-offer costs under Fed. R. Civ. P. 68. We affirm.

In this diversity case, Nevada state law determines Bevard's entitlement to attorney's fees. See Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 259 n.31 (1975) ("In an ordinary diversity case where the state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed." (internal quotation and citation omitted)) In Bowyer v. Taack, 107 Nev. 625, 627 (1991), the Nevada Supreme

Court held that litigants are precluded from recovering attorney's fees under Nevada Revised Statute 18.010 when they are precluded from obtaining such fees under Nevada R. Civ. P. 68. And, what does Nevada R. Civ. P. 68 say? "If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree shall not recover costs, nor attorneys' fees . . . ." (emphasis added). The Court in Bowyer also specifically held that "under .

. . [Nevada R. Civ. P.] 68 . . . taxable costs, attorney's fees, and prejudgment interest should not be included as part of a judgment to determine whether the judgment is greater than a previously tendered offer of judgment." 107 Nev. at 629. Excluding all costs and fees, we conclude that the judgment awarded at trial ($5,625) is less than the judgment offer ($8,001). Since Bevard is not entitled to attorney's fees for purposes of Nevada R. Civ. P. 68, she does not get attorney's fees under Nevada Revised Statute 18.010.

The district court determined that Bevard did not improve her position by rejecting Farmers' offer and going to trial and, therefore, that she was liable for Farmers' post-offer costs. See Fed. R. Civ. P. 68. Bevard only improved her position by going to trial if Farmers' offer included attorney's fees. It did not. In Nusom v. Cohm Woodburn, Inc., 122 F.3d 830 (9th Cir. 1997), we held that "a Rule 68 offer for judgment in a specific sum together with costs, which is silent as to attorney fees, does not preclude the plaintiff from seeking fees when the underlying statute does not make attorney fees a part of the costs." Id. at 835. We also stated that in a Rule 68 Offer of Judgment "any waiver or limitation must be clear and unambiguous" with respect to attorney's fees. Id. at 833.

In this case, Farmers' offer totalled $8,001, "including any recoverable costs and fees." The offer on its face includes costs, but it does not explicitly exclude seeking attorney's fees.

Defendant here did not make explicit that its offer did not permit plaintiff to recover attorney's fees as required under Nusom. Id. at 834 (noting that "defendants bear the brunt of uncertainty but easily may avoid it by making explicit that their offers do or do not permit plaintiffs to

recover attorney fees"). We therefore conclude that the offer did not include attorney's fees.

Since the offer of $8,001 did not include attorney's fees, Bevard did not improve her position by going to trial and winning a verdict of $5,625. (She does not get the additional costs she incurred going to trial because, had she accepted the offer, she would not have incurred them.) Adding pre-offer costs of $1,916 to the verdict gives a total of $7,541, which is less than Farmers' offer. She is therefore liable for costs under Rule 68.

AFFIRMED.

COUNSEL

James Andre Boles, Reno, Nevada, for the plaintiff-appellant.

Robert L. Eisenberg, Lemons, Grundy & Eisenberg, Reno, Nevada, for defendant-appellee.

Bevard v. Farmers Insurance Co., No. 95-16047

Norris, Circuit Judge, concurring in part and dissenting in part

I agree with the majority that Bevard is the prevailing party under Nevada law. I disagree, however, that Farmers'

offer of judgment for $8,001, "including any costs and fees," did not include attorney fees.

Nusom v. Comh Woodburn, Inc., ____ F.3d ____, 1997, slip op. 10669 (9th Cir. Aug. 26, 1997), does not control this case. In Nusom, the plaintiffs accepted an offer of judgment for "$15,000, together with costs accrued to the date of this office." The question presented on appeal was whether the acceptance constituted a waiver of plaintiffs' statutory entitlement to seek attorney fees. "As a waiver or limitation on attorney fees must be clear and unambiguous" (id. at 10672), we held that the plaintiffs' acceptance of the offer was not a waiver of fees because of the ambiguity created by its silence as to fees.

Here, Farmers' offer was not silent as to fees. It expressly included "any recoverable costs and fees." It is hard to imagine what "recoverable fees" Farmers' intended to include in the offer if not recoverable attorney fees. It is also hard to imagine that any lawyer, especially one experienced in settling cases, would interpret Farmers' offer to mean "including any recoverable costs and fees, but excluding attorney fees."

Aside from this crucial difference in the language of the two offers, Nusom does not control this case for another reason. Unlike the plaintiffs in Nusom, Bevard did not accept the offer of judgment. As a result, the "clear and unambiguous" standard does not apply because there is no issue of waiver of a statutory entitlement to seek fees.

The bottom line is that this appeal presents a straightforward question of contract interpretation: Did Farmers' intend to include or exclude attorney fees from its offer of judgment? If Farmers had intended to exclude

attorney fees, it could easily of said so. And it most certainly would not have used the words "including recoverable costs and fees."

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA
May 4, 1995

D.C. No. CV-93-00827-HDM
* * * * * * * * * * * * * * * * * *

DENISE BEVARD,

Plaintiff,

v.

FARMERS INSURANCE EXCHANGE, and DOES I-x and ROE CORPORATION, I-X inclusive,

Defendants.

* * * * * * * * * * * * * * * * * *

JUDGMENT UPON JURY VERDICT

This action came on for trial on the 24th day of April, 1995, before the Court and a jury, the Honorable Howard D. McKibben presiding Judge, and the issues having been duly tried, and the jury having duly rendered its verdict on the 27th day of April, 1995, in favor of Plaintiff, DENISE BEVARD, and against Defendant, FARMERS INSURANCE EXCHANGE.

IT IS HEREBY ORDERED AND ADJUDGED, that the Defendant, FARMERS INSURANCE EXCHANGE pay Plaintiff, DENISE BEVARD, sum of SEVEN THOUSAND FIVE HUNDRED DOLLARS AND NO CENTS ($7,500.00), reduced by TWENTY-FIVE PERCENT (25%) based an contributory negligence found on the part of Plaintiff, making total judgment of FIVE THOUSAND SIX

HUNDRED TWENTY-FIVE DOLLARS AND NO CENTS ($5,625.00).

DATED this 3rd day of May, 1995, at Reno, Washoe County, Nevada.

UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-16047
D.C. No. CV-93-00827-HDM
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DENISE BEVARD,
Plaintiff-Appellant,

v.

FARMERS INSURANCE EXCHANGE,
Defendant-Appellee.
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Dated: 12/12/97

ORDER

Before: NORRIS and KOZINSKI, Circuit Judges, and MOLLOY, District Judge.

IT IS ORDERED that the Petition for Rehearing be denied.

/s/_____